TODD KIM
Assistant Attorney General
United States Department of Justice

SHANNON BOYLAN (DC Bar No. 1724269)
ARWYN CARROLL (MA Bar No. 675926)
United States Department of Justice
Environment and Natural Resources Division
150 M St NE
Washington, DC 20002
Tel: (202) 598-9584 (Boylan)
Tel: (202) 305-0465 (Carroll)
Fax: (202) 305-0506
shannon.boylan@usdoj.gov
arwyn.carroll@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

WESTERN WATERSHEDS PROJECT, OREGON NATURAL DESERT ASS'N, WILDEARTH GUARDIANS, and CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiffs,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR and BUREAU OF LAND MANAGEMENT,

Defendants.

Case No. 2:21-cv-00297-HL

DEFENDANTS' RESPONSE TO PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY

Environmental Defense Center v. Bureau of Ocean Energy Management, No. 19-55526, 2022 WL 1816515 (9th Cir. June 3, 2022), breaks no legal grounds on issues relevant to resolving Defendants' Motion to Dismiss the Complaint and Memorandum in Support, ECF No. 21. This case is moot because both the challenged January 19, 2021 grazing decision regarding the Bridge Creek Allotment and the finding of no significant impact ("FONSI") were rescinded, there is currently no grazing authorized on the allotment, and there will be no grazing unless and until the U.S. Bureau of Land Management ("BLM") issues a new decision authorizing grazing on the allotment after completing an environmental impact statement ("EIS"). *See generally id.*; Reply in Supp. of Defs.' Mot. to Dismiss, ECF No. 25. Thus, there is no longer a live controversy for the Court to resolve.

Plaintiffs cite *Environmental Defense Center* for the proposition that an EIS together with its Record of Decision—or an environmental assessment ("EA") together with a FONSI—constitute a final agency action subject to review under the Administrative Procedure Act ("APA"). Notice of Supp. Auth. at 2 (quoting *Envtl. Def. Ctr.*, 2022 WL 1816515, at *8). But the issue in this case is mootness, not finality. Even if finality were at issue here, moreover, BLM withdrew the challenged decision and the challenged FONSI, committed to developing an EIS, and clarified that no further grazing will be authorized before the agency completes that new NEPA process. Plaintiffs cite no authority for the proposition that they may challenge an EA alone, independent of a FONSI. And they cite no authority for the proposition that they may challenge an earlier step in an agency's NEPA process where, as here, the agency continues its work on an EIS.

Second, Plaintiffs point to the Ninth Circuit's discussion of ripeness in an attempt to rebut the argument that they have alleged no injury resulting from the EA by itself without an

accompanying decision authorizing grazing. This is a non-sequitur. In their reply, Defendants explained that a procedural injury standing alone, without a concrete injury, is not sufficient to establish standing, relying on *Summers v. Earth Island Institute*, 555 U.S. 488, 497 (2009). *See* Defs.' Reply at 6-7. That is settled law. Plaintiffs have not demonstrated a concrete injury to their interests and therefore have failed to show that they have standing to pursue a claim solely against the EA. Further, whether a NEPA challenge to a programmatic environmental analysis is ripe before a site-specific action occurs (the issue in *Environmental Defense Center*) is beside the point here. This case was, at one point, ripe, but whether it was ripe when BLM issued the FONSI or the grazing decision is now irrelevant. Instead, the issue is whether this case is moot now that both the grazing decision and FONSI have been rescinded. Nothing in *Environmental Defense Center* alters that analysis. The Court should find that this case is moot.

Dated this 17th day of June, 2022.

Respectfully submitted,

TODD KIM
Assistant Attorney General
Environment and Natural Resources Division

/s/ Shannon Boylan
SHANNON BOYLAN, Trial Attorney
ARWYN CARROLL, Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Natural Resources Section
150 M St. NE
Suite 3.1406
Washington, DC 20002
Tel: 202-598-9584, 202-305-0456
Fax: 202-305-0506
shannon.boylan@usdoj.gov
arwyn.carroll@usdoj.gov

Attorneys for Defendants